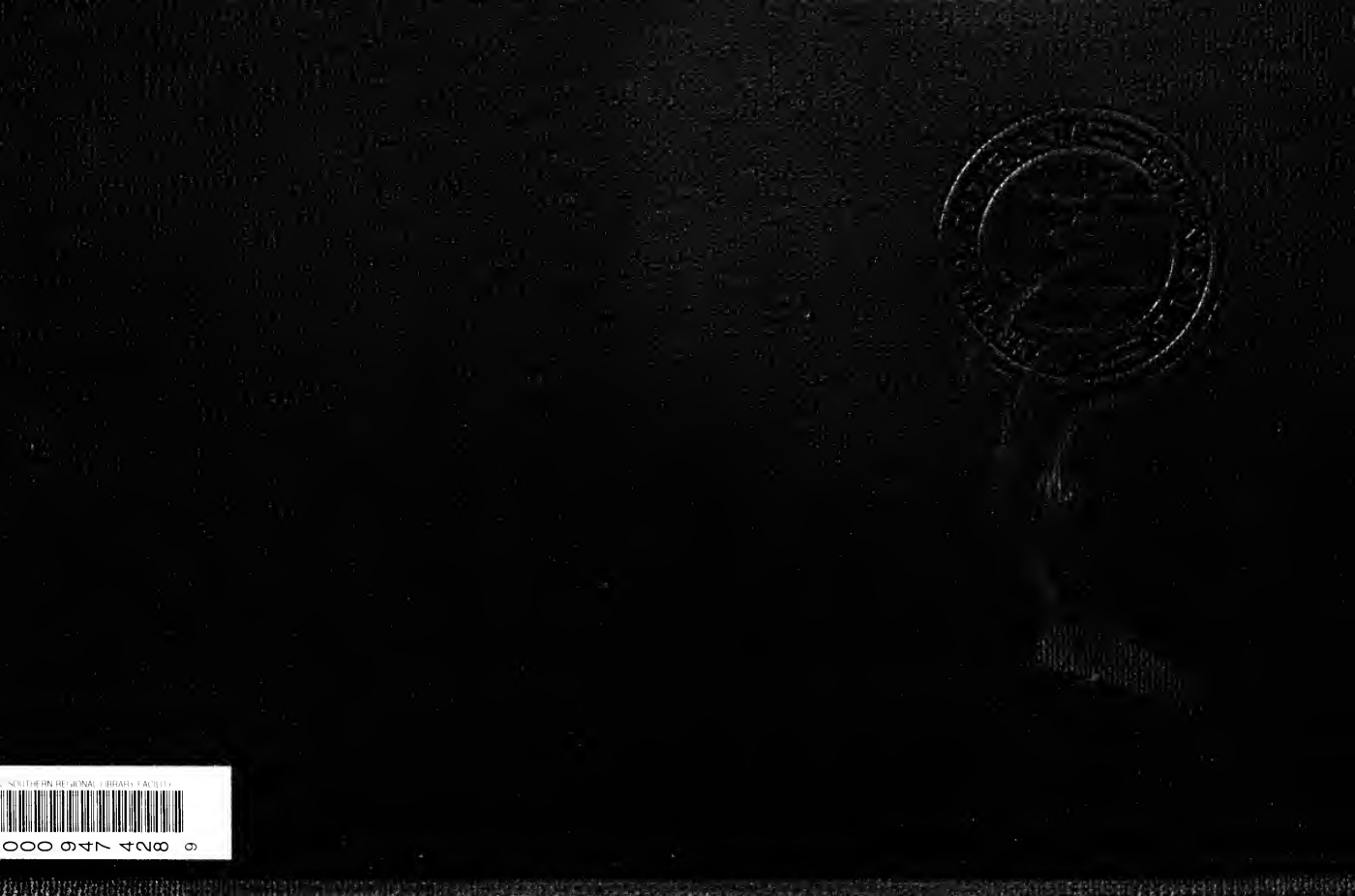

No. 3,699.

IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

The City and County of San Francisco

Plaintiff and Appellant,

VS.

The Spring Valley Water Works,

Defendant and Respondent.

Respondent's Petition for Re-hearing.

CHAS. N. FOX,

Attorney for Respondent.

A. CAMPBELL, SR.,

Of Counsel.

AND ARGUMENT OF

S M. WILSON, AND

J. P. HOGE,

Of Counsel.

SAN FRANCISCO:

JOS. WINTERBURN AND COMPANY, PRINTERS AND ELECTROTYPERS,

417 Clay Street, between Sansome and Battery,

1873.

IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

CITY AND COUNTY OF SAN FRANCISCO,
Plaintiff and Appellant,

vs.

SPRING VALLEY WATER WORKS,
Defts. and Respondents.

Petition of Respondent for Rehearing.

Respondents respectfully petition the Court for a rehearing in this cause, on the grounds and for the reasons set forth in the points and arguments following, and hereto annexed.

We desire by way of preface to our regular points to say that at the hearing a brief in reply was filed by John F. Swift, Esq., of Counsel for Plaintiff, to which we have had no opportunity to respond, and as it almost entirely ignored the law upon which the Court had intimated the case

must turn, we could not afford to devote much of the brief hour given for oral argument to a consideration of its propositions.

It is full of glittering generalities, purporting to be based upon historical facts; nearly all of which are outside the records of this case, and very many of which we are prepared to show partake largely of fiction. These statements not being in the record and not seeming to us pertinent upon a law argument, we have not supposed they would enter into the consideration of the Court, but if they have been, or are to be considered as contributing towards a solution of the legal rights of these parties, we desire an opportunity to reply to them; an opportunity which should be granted for the reason, that the line of argument adopted by Mr. Swift is entirely new to the case (if not new in any case,) and was broached for the first time at the very close of the case.

I.

We think that the Court erred in holding that the questions arising on this appeal, except that of former recovery are not precisely the same as those which were adjudicated by this Court on the former appeal (39 Cal. 473). The Court, in its recent decision says :

"On the former appeal, the only questions be-
"fore us were : First, whether the Court below

"properly refused to grant a temporary injunc-
"tion; second, whether the Court erred in sus-
"taining the demurrer to the complaint. On the
"first point, we affirmed the order denying the
"injunction, and decided that inasmuch as the
"complaint contained no sufficient averment to
"the effect that water has been introduced into
"the City and County by any other person, it was
"not incumbent on Ensign and his associates, or
"their successors, until the happening of that
"event, to furnish water free of charge for general
"municipal purposes, exclusive of that required
"for the extinguishment of fires."

This is a statement of the former decision upon that point, as we understood it, and we submit that the point was directly involved and necessarily decided on the former appeal; that such decision necessarily involved a consideration of all the statutes and ordinances bearing upon the question of the rights of plaintiff and the duties of defendant, as affected by the facts as then before the Court, and that so long as the facts remain the same, that decision is and ought to be held to be *res adjudicata*. Are the facts, as presented on this appeal, different from those presented at the former hearing? It will only be necessary, for the purposes of this petition, upon this point, to see what the averments of the two complaints were with reference to the introduction of water into the City, by the San Francisco City Water Works.

The complaint on the former appeal, on this subject read as follows :

"That the said Corporation known as the San "Francisco City Water Works was by the said "plaintiff granted various rights and privileges, "and the same were granted under and in pursu- "ance of Section 1 of an ordinance of the City and "County of San Francisco, *which was passed on the* "*29th day of August* 1859 entitled order No. 172 "amendatory of order No. 46 and repealing order "No. 65 and order No 92, in relation to the San "Francisco City Water Works ; which said order "was ratified and confirmed by an Act of the "Legislature, entitled 'an Act to ratify and con- "firm order No. 172 of the Board of Supervisors "of the City and County of San Francisco,' ap- "proved April 12th 1860 which said Section 1 of "said ordinance so ratified is herewith attached, "marked Exhibit C. and made a part of this com- "plaint.

"That under and in pursuance of said sec- "tion, the rights and privileges granted to the "said San Francisco City Water Works were ac- "cepted and used by the said corporation and "said corporation *did introduce pure fresh water into* "*the City and County of San Francisco, through lands* "*claimed as belonging to the City and County of San* "*Francisco* (*this plaintiff*) *in pursuance of said section.*"

The complaint on the last appeal contained the same matter and also had the following paragraph which constituted the amendment :

" That heretofore, to wit : between the said 15th " day of June, A. D. 1857, and the first day of " September, A. D. 1858, the said corporation " known as the San Francisco City Water Works " was by the statutes of this State, and the orders " and ordinances of the Board of Supervisors of " the City and County of San Francisco, in that " behalf duly passed and approved, authorized " and required to introduce into said City and " County pure, fresh water, for fire, municipal and " other purposes ; which authority last aforesaid, " and the rights thereunder, were accepted by the " corporation last aforesaid ; that while the au- " thority last aforesaid continued, to wit: on the " 16th day of September, A. D. 1858, the corpo- " ration last aforesaid did introduce into said City " and County pure, fresh water for fire, municipal " and other purposes, and continued from that " time to introduce water as last aforesaid into " said City and County, until the time of convey- " ance by the corporation last aforesaid unto the " defendant herein, as hereinafter stated, and du- " ring that time had authority to introduce water " as last aforesaid." (Trans. folios 5 and 6.)

To these three paragraphs, of the complaint, the first two also standing in the former complaint,

we beg leave to call the special attention of the Court. The facts stated in them, have at all times stood admitted. We submit that they do not differ, in any essential particular, material to the cause of plaintiff. The first averred postively, that water was introduced under and in pursuance of an order passed in August 1859. This was after the date of the passage of both the Ensign acts, so that there can be no question but that if the San Francisco City Water Works can be held to be the some "other person or persons" contemplated by the Legislature in the passage of those acts, the fact thus averred showed that it was done "thereafter" to wit: after the passage of those acts. The amendment is inconsistent with the original complaint (which still stands) in that it fixes the precise date of the introduction, and fixes it at a time prior to the date of the only one of the Ensign acts under which Defendants have any power to introduce water into said City and County.

We hardly know whether to understand the Court, in its late opinion, as intimating that we practiced a deception upon the Court on the former appeal, in the position which we took in regard to the averments of the complaint or not. We can only disavow any intention to practice any such deception, even if we could have done it, and affirm our continued belief that the position then

taken by us, was correct as to that complaint, and that in our judgment the same position is correct as to the present one. Neither are we willing to believe that the Court, in making its former decision, either by inadvertence or through the misleading of counsel for respondent, overlooked those two important paragraphs of the complaint; particularly so, when attention was called to them in the able brief of counsel for appellant, in his Analysis of the Complaint.

And we respectfully submit, that there is no inconsistency in the positions taken by us on the two appeals. Our position on the first appeal was that the complaint did not show that the "thereafter" mentioned in the Statute had ever come; that it did not show that water had, since the date of the Ensign Franchise, been introduced into the City by any "other person or persons." Our position at that time was based, not upon the fact that it was not averred that the San Francisco City Water Works had introduced water into the City after the date of our franchise, but upon the single and sole proposition that the San Francisco City Water Works was not "some other person or persons," within the meaning of the statute, for the reason that *it* was, at the date of our franchise, a corporation in existence, having the right to introduce water, engaged in the construction of its works, known to the Legislature, and its rights protected by the provisions of our act. On the

second appeal, we took the same position as to the amended complaint. This was done on the ground already stated, and on the further ground that it now appears that the San Francisco City Water Works was actually introducing water into the City at the date of the only Ensign Act, which authorizes us to introduce water there at all. This seems to us the strongest kind of evidence that the Legislature did not intend that the rights or duties of Ensign and his associates should be affected, enlarged, or restricted by the acts of the San Francisco City Water Works.

We did not dwell at length upon this point, in our last brief, for the reason that we believed that the proposition was clearly understood and affirmed in the former decision, and that a simple allusion to it was sufficient. But it was fully presented by our able colleague, in his oral argument, while we devoted ourselves to the work of trying to show the Court that the new matter in the complaint presented no new fact for the Court to pass upon.

Again, the Court in its late decision seems to hold that though the former complaint may have contained a sufficient averment, that water had been introduced into the city by the San Francisco City Water Works after the date of the Ensign franchise, yet respondents are estopped from claiming that it did, because their counsel on the argument claimed that it did not. This is, to us, a new ap-

plication of the doctrine of estoppel. We concede that parties may be estopped by their pleadings, but we never before learned that their rights could be lost by way of estoppel, by the arguments of counsel. And, besides it was not claimed by any of the counsel for respondent, that there was no sufficient averment of the introduction of water by the San Fiancisco City Water Works: we only claimed that there was no averment that water had been so introduced by any "other person or persons," within the meaning of the statute.

II.

The new matter in the amended complaint, even if it does state a new fact, cannot now be considered by the Court. It appears from the face of the complaint, as amended, that the fact stated in the amendment was one that arose long before the commencement of this suit; presumptively it was within the knowledge of plaintiff at the time of the commencement of this action, and nothing appears in the complaint to rebut that presumption. It was, then, a fact which could have been stated and passed upon at the original hearing, and one bearing directly upon the important question then before the Court, and upon which the Court was compelled to pass. If it was not stated, it was the fault of plaintiff, and not of the Court, and the decision of the Court became and was

res adjudicata as to that fact, the same as if it had been stated.

We understand your Honors, in your late decision, to hold that, upon the facts as then presented, the former decision is *res adjudicata* upon the question of the right of the city to water, free of charge, for municipal purposes, other than the extinguishment of fires. If so, then the same rule applies as against any state of facts which could have been presented at that time.

"An adjudication is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have litigated, and have had decided, as incident to, or essentially connected with, the subject matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and defence."

Harris *vs.* Harris, 36 Barb. 88.

Clemens *vs.* Clemens, 37 N. Y. 59.

This action is eminently one to determine the rights of the plaintiff in certain property of the defendant. The Court in its former decision passed upon those rights, as they then existed, upon all points except the one of former adjudication. That decision was final, until the plaintiff shows some right, or some fact giving a right which did not exist at the time of the former decision. No

attempt is made to do this. The most that can be claimed is that by the amendment plaintiff has attempted to set up a fact which existed at the time of the former decision, but which he says was not pleaded.

"To avoid the estoppel, the losing party must show some other right * * * than that which he had when the estoppel was created. He is bound to show such other right, because his former claim of right was determined by the recovery."

Marshall *vs.* Shafter, 32 Cal. 196.

The subject matter of the action, and the fact in issue, was the right of plaintiff to water from the works of defendant, free of charge, for general municipal uses. Plaintiffs presented such evidence in support of that fact as they saw fit, and they are bound by the determination of that issue, so far as it is affected by any evidence then existing.

Caperton *vs.* Schmidt, 26 Cal. 479, and cases there cited.

Jackson *vs.* Lodge, 36 Cal. 28.

"The discovery of new evidence, not in the power of the party at the former trial, forms no exception to the rule in relation to estoppels."

Kilheffer *vs.* Kerr, 17 S. and R. 319.

The former decision is final as to the subject matter then in issue, and as to every other matter

which the parties might then have litigated and have determined.

Gray et al. *vs.* Doherty et al., 25 Cal. 272.

Under the rule laid down in *Emerson vs. Sansome*, 41 Cal. 552, the introduction of water by some other person or persons, after the date of the former decision, would, according to the terms of that decision, have given the plaintiff a new right, and avoided the estoppel. But there is no pretence of such a fact, or of any fact giving a right subsequent to the date of that decision, not possessed at the time, and the decision is, therefore, final upon that point.

Thompson *vs.* McKay, 41 Cal. 266.

Upon the principle laid down in *Taylor vs. Castle*, 42 Cal., 367, if the new matter set up in this complaint would have sustained a decision in favor of plaintiff at the former hearing, then the former decision is final and has become the law of the case.

III.

And we ask your Honors also to again consider the effect of the Amendatory Act of 1859. We have carefully studied your Honors late decision, and reviewed our own position upon that point, and it is in no spirit of captiousness, but with a realizing sense of the weight due to such an authority, and of our duty to our client, that we again approach that subject. After a full review of the question,

we are unable to see how, *under our Constitution*, it can be held that the right of the City to take water from these works, or the duty of the defendant to furnish it, is given or prescribed by an Act which is to be construed as dating from 1858 ; or why the case of Billings *vs.* Harvey (6 Cal. 383) is not directly in point.

The Section 3, under which this right is claimed, or this duty imposed, was passed in 1858. it is true. But what does it amount to if it is left to stand alone ? Strike out section one of the same Act and what is there left for *any other part* of the Act of 1858 to operate upon ? With section one repealed, the balance of the Act is all a nulity—it all falls to the ground, is worse than waste paper. It then becomes a senseless jumble of words, appearing upon its face to impose duties, obligations and restrictions upon the enjoyment of a franchise which has no existence. Section three in terms gives the Chief Engineer the right to tap any pipes *so laid down*, and receive water therefrom. How laid down ? Under section one. With section one repealed—all the balance of the Act together gives no power to lay down any pipes; hence the right to tap becomes an empty right, for there is nothing to be taped. And after the happening of a certain event which it was presumed might happen in the future, as your Honors hold (although we do not wish to be un-

derstood as admitting it) it would be the duty of Ensign and his associates to furnish their quoto of whatever water might be produced by them under the franchise granted by that Act. But with section one repealed, *there is no franchise*, and the imposing of the duty becomes a vain act.

Is section one of the Act of 1858 repealed? Your Honors say that it was reenacted by the Act "of April 11th, 1859, *in totidem verbis*, with the "exception that the time limited for laying down "the pipe was to be *two* years from the passage of "that Act instead of one year from the passage of "the former Act." Granted, and what is the consequence? The Court says "its effect was merely to extend the time." To extend the time, or rather to grant a new period within which to lay down pipes which it had been hoped would be laid under the first Act, we concede was one of the effects of this new enactment. Under the ordinary construction of statutes, this extension of time might have been its only effect. But we must not forget that we are acting under a constitutional provision different from that under which this ordinary rule of construction has grown up. This new rule, and the reason for it cannot be better expressed than was done in *Billings vs. Harvey* 6 Cal. 383, and which we here repeat:

"According to the ordinary construction of statutes, a mere amendment would not have the

effect of changing the operations of the Act amended as to time, except so far as the alteration itself is concerned; *but under our constitution a new rule is adopted for the amendment of statutes, totally different from that which had before prevailed.* Section 25 of Article IV ordains that 'no law shall be revised or amended by reference to its title; but in such case the act revised or section amended shall be re-enacted and published at length.'

"*From this language it appears too clear to require argument, that if a statute, or section of a statute, is re-enacted, it is totally inconsistent with the idea that the old statute or section still remains in force, or has vitality for any purpose whatever.*

"*The re-enactment creates anew the rule of action, and even if there were not the slightest difference of phraseology of the two, the latter alone can be referred to as the law, and the former stands to all intents and purposes as if absolutely and expressly repealed.*"

And we submit that this decision is exactly in point, in determining whether or not section one of the Act of 1858 is repealed. Let us see. A Statute of Limitations was passed in 1850. In 1855, an Act was passed—*amendatory of the former act*—precisely as in this case. By the Act of 1855, section six of the Act of 1850 was "re-enacted *in totidem verbis*," with the addition of a proviso which the Court in considering the case says "in no manner affects the operation of the

section in the present case, if it is still in force." Thus it will be seen that it would be difficult to find two cases where the lines are drawn nearer parallel than in *Billings vs. Harvey* and the case at bar, where the question is, what was the effect of the amendment upon the section amended. And the Court held, in the clearest of language, that section six of the Act of 1850 was repealed, and the section as re-enacted in 1855, even if there was *no difference* in the phraseology, *could alone be referred to as the law.*

This decision has stood as the unquestioned law of this State for seventeen years. It was affirmed by the same Court in the following year (*Billings vs. Hall*, 7 Cal. 3) and again in 1860 in *Morton vs. Folger*, 15 Cal. 284, where the Court, after referring to *Billings vs. Harvey* say "the most cogent reasons exist for adherence to the decision there made"—and again in 1864, in *Clarke vs. Huber*, 25 Cal. 596, the Court re-affirms *Billings vs. Harvey*, and the other cases, and say, "it is now too late to question the correctness of the rule established by those decisions." If it was too late in 1864 to question a construction of the constitution which had been promulgated by the Court of last resort, and prevailed for only eight years, ought we not to hesitate before we reverse that construction after it has prevailed for seventeen years?

What follows? Simply that the Franchise granted to Ensign and his associates by section one of the Act of 1858 has been repealed, absolutely nulified—it has no existence for any purpose. No franchise was granted by or under any other part of that Act, and the restrictions imposed, and rights given by section three, and all the other sections of that Act become inoperative and void, for the want of an object upon which to act.

IV.

Always willing, as we have been, whether required by law or not, to furnish water free of charge for the extinguishment of fires, and confident that never since the date of our Franchise, had water been introduced into the City by any other person or persons, we have never seriously contended that the provisions of section three of the Act of 1858 did not apply to us; but have contended ourselves with the proposition that if they did apply, it must be as if passed in 1859. Unless so construed, no application could be made of those provisions, for reasons above stated.

But we now submit the proposition, and insist that it is the law—that there is no section three to any Franchise under which this defendant, as the successor of Ensign and his associates, is or ever has been introducing water into the

City of San Francisco. That the only Franchise to Ensign and his associates and successors now in existence is the one found in the Act of April 11, 1859. (Exhibit B. to complaint, Trans. ff. 35 to 38.) That this franchise is free from any and every condition and restriction, except that three thousand feet of pipe shall be laid within two years from the date of the Act, and water furnished to such *citizens* along the line as may elect to take the same, and the balance of the pipes be laid as soon thereafter as practicable; and that nothing in it shall inure to or affect the rights and privileges of the Mountain Lake Water Company, or the San Francisco City Water Works Company. This is the only Act now in force, granting any franchise to Ensign and his associates, and these are the only restrictions imposed upon the franchise by that or any subsequent Act. The franchise of 1858 being repealed, the restrictions imposed upon *it*, fall with it, whether repealed in express terms or not. They cannot be tacked on to a franchise granted by a subsequent Act, unless it is done by legislative enactment, and such is not the case here.

"No law shall be revised or amended by reference to its title, but in such case the Act revised, or section amended, shall be re-enacted and published at length."

Const. of Cal., Art. 4, Sec. 25.

The Act of 1859 was not an Act to amend a section of the Act of 1858, but it was an act to amend *the whole* Act of 1858 (Trans. f. 35.) It was therefore the duty of the Legislature to re-enact and publish at length all that it intended to keep in force of the Act of 1858. A Court will hardly assume that the Legislature neglected a constitutional duty, unless they find in its work some such incompleteness or imperfection as renders the Act nugatory, or that from error in judgment or some other cause, the Legislature has passed an Act which in its terms or by necessary implication, violates the constitution. It will hardly be contended that the Act of 1859 is incomplete in itself, or that it is in any respect unconstitutional. It re-enacts and publishes at length section one of the Act of 1858, wholly omits all reference to the other sections, and gives us as an entire new section, numbered 2; the restriction found in section 7 of the old Act. It thus gives us an Act complete in itself, and repeals so much of the Act of 1858 as to leave the balance inoperative and inefectual, *and does not re-enact it.*

The municipality of San Francisco does not therefore possess any more right, power or control in or over the property of this defendant, than of any other person whomsoever.

At first blush it might appear that to carry the rule to the extent here claimed, would endanger the vitality of other statutes which have been supposed to be valid laws. But we think not. It is not often that we find a statute of many sections, where the whole vital part of it is found in one section, so that that one may be re-enacted by way of amendment, and become a complete law in itself, leaving all the others out. Nor it is often that by striking one section out of nine, as in this case, all the rest are left so imperfect as to become inoperative and void. The fact that such was the result in this case rendered it unnecessary in passing the Act of 1859, to make any allusion to the remaining sections of the Act of 1858, unless it was intended to re-enact them.

Again it is the province of the Court, not to make laws, but to declare what is the law in a given case, without reference to the consequences in any other case. And we are urging no new principle—we are only urging the Court to adhere to to an old one. Ever since the state was organized, the laws have been made in the light of this constitutional provision, and for seventeen years they have been made in the light of this construction of the constitution.

As to the consequences in this particular case, they would be simple, fair and just. The effect would be simply to declare that this defendant is

the owner of a franchise, granted by the Legislature for the purpose of inducing a combination of private capital to create works to supply a great public want, a franchise in the enjoyment of which it is entitled to the same protection, and subject to the same duties as other citizens—no more, no less; bound to bear the same proportion of the public burthen in the way of taxation, entitled to the same protection against having its property taken for public use without just compensation, but subject to the same law which in times of great peril permits the taking of its property for the preservation of the lives or property of the community from threatened and imminent destruction, and in the exercise of its granted street privileges, subject to the same police regulations of the municipality as others—that the use shall be so exercised as not to become an abuse.

With these remarks, and with a reference to the additional points and arguments made by associate counsel who have been at different stages of the case connected with us in its management, and whose arguments are herewith submitted, we respectfully submit the case, and ask that a rehearing be granted.

CHAS. N. FOX,
Att'y for Respondent.

A. CAMPBELL, Sr.
of Counsel.

IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

THE CITY AND COUNTY OF SAN FRANCISCO, *Appellant,*	
vs.	
THE SPRING VALLEY WATER WORKS, *Respondent.*	

Argument of S. M. Wilson and J. P. Hoge, of Counsel for Respondent, in support of the Petition for Rehearing herein.

This is the second time this case has been before this Hon. Court on appeal. The decision on the first appeal is to be found reported in the 39th Volume of California Reports, at pages 477 and following.

That decision seems to be full and final upon all the questions upon which the Court passes on the second appeal. The complaint is the same in legal effect now, as it stands in the first record,

and Counsel for the Respondent therefore relied with confidence upon the first decision as being the law of the case, and believed that the second decision would be the same. If they erred in this view they may be pardoned, for it was the view entertained by the Hon. Judge of the 15th Judicial District, who brought to the determination of the case great clearness of judgment, great learning and long experience as a Judge.

But this Hon. Court in its last decision does not, as we understand the case, determine as a question of law or of fact, that the complaint in the present record, is different in legal effect from what it was in the first record. The Court does not dispute the well established rule that if the records are in legal effect the same, the decision first made becomes irrevocably the law of the case, however erroneous it may be. This proposition has been so often determined by this Court, that it needs but to be stated to be observed. Yet the Court on this second appeal examines the Complaint as *res integra;* not because there is a material amendment, not because the established practice of the Court permits it, but upon the ground of an equitable *estoppel*, arising out of the argument of Respondent's Counsel on the first hearing. Having disposed of that question in that way, and having determined that the views given in the first appeal in construction of the

statute were *obiter dicta*, the Court proceeds to consider the statutes anew, and to determine their true construction and meaning.

The Court deemed it unnecessary to consider the question of former recovery or estoppel. set up in the complaint.

To aid the Court in determining whether a rehearing should not be granted, attention is respectfully invited to a consideration of the following questions, viz:

1st. Does the amended Complaint differ materially from the original Complaint?

2d. If the original and amended Complaints are substantially the same, why is not the decision on the first appeal, the law of the case on the second appeal?

3d. Is the defendant under any of the obligations imposed upon Ensign and his associates, by the Act of April 23d, 1858?

4th. Did the last named Act ever become a law or go into effect?

5th. Is the last named Act constitutional?

6th. What is the true construction of that Act?

In discussing these questions, the Complaint in the first record will be called for convenience, the original Complaint, and that in the second record, the amended Complaint.

I.

The amended Complaint does not differ materially from the original Complaint.

A comparison of the records on the first and second appeals, will show that the complaints are identical in every respect, excepting that portion of page two of the present record, comprising folios five and six (exclusive of the last line of the page.)

The simple inquiry is—did this materially change the Complaint? The *gravamen* of the original Complaint in this respect was, that an event had happened, which gave to the City the absolute right to have the water of the defendant "for fire and other municipal purposes" free of charge; that the defendant denied this right, and threatened to cut off the supply; and that an injunction to prevent this was necessary to the protection of the City. It was averred that there was a Water Company called the San Francisco Water Works; the laws and ordinances of its creation, and affecting its rights and duties were referred to, pleaded, and in part annexed as exhibits to the Complaint. In a word, it was shown to be a duly incorporated Water Company for the purpose of introducing water into the City and County of San Francisco, with

power to do so, and that it accepted its privileges, and that "*said Corporation did introduce pure fresh water into the City and County of San Francisco*, through lands claimed as belonging to the City," &c. (Fol. 9, first record, same as Fol. 8 of second record.)

The amended Complaint, retaining all of these allegations, only duplicates in the amendment the same averments with a change in dates, or rather, with a date before omitted, and that only averred under a videlicet. Dates are never material, and even under the old system of pleading, the videlicet was used to indicate that the pleader did not intend to assert a positive date, and in such a connection as that contained in this complaint, it will not be contended that a date was material.

Each Complaint sets forth the existence, and powers, and privileges of the Corporation called the San Francisco Water Works, and each alleges that pursuant to its powers and privileges, it did introduce such water into the City. In order that these allegations as to the introduction of water may be more plainly seen, they are here presented in juxtaposition in parallel lines; it being remembered that in each, the lines quoted are preceded by allegations of authority and power, in the said Corporation, to so act.

Original Complaint.	Amended Complaint.
"That under, and in pursuance of said Section, the rights and privileges granted to the San Francisco City Water Works were accepted and used by the said Corporation, *and said Corporation did introduce pure fresh water into the City and County of San Francisco*, through lands claimed as belonging to the City and County of San Francisco, (this plaintiff) in pursuance of said Section."	"That while the authority last aforesaid continued, to wit: On the 16th day of September, A. D. 1858, *the Corporation last aforesaid, did introduce into said City and County, pure fresh water*, for fire, municipal and all other purposes, and continued," &c.

The entire *gist* of the allegation being considered—the fact that water was introduced into the City—we confidently submit that the averments are identical in substance and legal effect. The language of the law of the 23d April, 1858, (Stat. 1858, page 254), at which the pleader was aiming in each case reads as follows, viz: "*Up to, and until such time as water shall be introduced into said City and County, by some other person or persons.*"

The original Complaint contains the averment, that the San Francisco City Water Works "did

introduce pure, fresh water into the City and County of San Francisco." The amended Complaint alleges that the same Corporation "did introduce into said City and County, pure fresh water for fire, municipal and all other purposes."

It is not now being discussed as to whether these averments in either Complaint are sufficient to bring the case within the law, but the object is to show that the Complaints in respect to the fact of the introduction of water into the City are alike.

It will certainly be contended by no one, that the Complaints must be identical, and that any amendment of a Complaint makes a new case, and renders nugatory the first decision of the Court. If so, a party can, on a cause being reversed and remanded, change a date, or vary an averment, and thus claim that the decision of the Supreme Court solemnly made, and upon the same substantial facts, is not the law of the case. Such an ingenious method of avoiding the decisions of this Court, has never occurred to the minds of the bar, surely, or it would have been acted on. It has always been regarded as unavoidable, that a decision once made in a cause becomes the law of a case, and controls it in all future appeals, unless it comes again with new and substantial facts, that no longer leave the first decision applicable.

Here the same averments in substance were

made. The same evidence which would have proved the allegations of the original Complaint, would have proved the amended Complaint. According to the first decision, the original Complaint would have been bad on demurrer, except for the judgment set forth in the Complaint as an estoppel; and it was only because of this alleged judgment, that the cause was remanded to the Court below for further proceedings. Omitting then the judgment from the original Complaint, can it be that that Complaint is bad on demurrer, and that the amended Complaint with the same omission is good? Can it be that the whole equity in the original Complaint rests on the judgment set forth in it, but that the amended Complaint has an equity in it, outside of, and beyond the judgment pleaded? It is manifest that this cannot be, and it is equally plain and clear, that if law be a science, each of these Complaints must stand or fall by the same test.

It does not seem, however, that the Court in its decision has contravened these views, and they have been elaborated to make clearer the propositions that present themselves for consideration under the next point. It will be assumed, therefore, that the first point cannot be disputed—that the amended complaint does not differ materially from the original complaint.

II.

The original and amended complaints being substantially the same, why is not the decision on the first appeal the law of the case?

In both complaints, and especially upon the first appeal, it was sought to establish the duty of the defendant to furnish water for all municipal purposes to the city, as arising from two sources; *first*, from the condition of the grant to Ensign and his associates, and *second*, as the successor of the San Francisco City Water Works—being successor to its burdens and obligations, as well as its property and rights. But the Court held "that the rights of the plaintiff in this respect must be ascertained entirely from the conditions of the grant to George Ensign and his associates." (39 Cal. 478.) The Court also held that "it is not averred that water had been introduced into the City and County by any other person or persons. The City, therefore, is not entitled to the use of water from the pipes of the defendant for other purposes than the extinguishment of fires, free of charge, by reason of the Statute." (*Ib.* 479.)

Here the Court, with the Statute spread before it, held directly that the averment in the complaint did not show that the event specified in the Statute as a necessary occurrence to produce the alleged duty had happened, and that, therefore,

there was no duty incumbent upon the Company to furnish water free of charge except for fires.

If the original complaint did not show (in the language of Mr. Justice Crockett, in his separate opinion, 39 Cal. 483) "that the event has happened," it follows that the amended complaint equally fails to show it.

In the opinion on the second appeal the Court says that in the first opinion the Court held that "the complaint failed to aver that the event had transpired."

How this Hon. Court met the question and was enabled to place one construction upon the original complaint, and another upon the amended complaint, is best shown by the following extract from the last decision:

"But it is now said that the Court misconstrued the complaint, and that it did in fact contain the averment which was assumed to have been omitted. However this may be, the defendant is estopped from raising the point. The adjudication of the Court, as to the character of the complaint and its legal effect, has become the law of the case, and it is too late now to inquire into its correctness. It may be remarked, however, that if the Court fell into an error in the particular referred to, the counsel who now raises the point fell into the same error; for on referring to his brief on the former appeal, we

find the statement that 'the complaint not only fails to show, but it positively negatives the proposition that any other person or persons have introduced water into said City and County.' The defendant has had the benefit of a favorable ruling by this Court, on the assumption that the above statement was true; and we are now asked to decide that the plaintiff shall be precluded from supplying the omitted averment, on the ground that it is *not* true that the omission existed. But the defendant will not be permitted to claim the benefit of our former ruling and at the same time to repudiate the existence of the assumed fact on which the ruling was based. We are, therefore, of opinion that we are not precluded on this appeal from considering the legal effect of the averment in the second amended complaint in respect to the introduction of water by the San Francisco City Water Works, in September, 1858."

As to the estoppel said to arise from a former argument in a cause, we respectfully urge that a cause must be tried on the record and on the record alone. The argument of counsel is to be regarded only so far as it produces conviction on the mind of the Court. The judgment is that of the Court alone, and all its responsibilities attach to the Court alone. If counsel misapprehends a point or misconceives the law, or mistakes

the facts or erroneously construes a complaint, it is his misfortune; but if he is free from fraud in the matter, can it be that the unfortunate client is to be visited with a penalty for such innocent error? If counsel intentionally misleads the Court, it is a matter personal to him, and the Court should deal with him individually for it. But it is to be noted that the Court does not charge the counsel from whose brief the extract in the opinion of the Court is made, with having made an intentional misstatement, nor with having misled the Court; indeed it is not even assumed that the Court relied upon that statement. It is hardly to be supposed, that in determining a demurrer to the complaint, the Court did not itself read the entire complaint. That this part of the complaint was brought prominently before the Court, is shown by the able brief of the former City Attorney, Mr. Nouges. At page three of his brief on the first appeal, will be seen his analysis of the complaint, presenting in bold relief the averments in the complaint on the subject of the introduction of the water into the city. It is clear from the opinion of Mr. Justice Temple in the case, on the first appeal, that he carefully canvassed the whole complaint, and that nothing escaped him. It is, therefore, irresistible that the Court in its decision was construing the complaint, and that the averment so much relied on by the City was held not to meet the event contemplated by the Statute—in other

words, that an averment that the San Francisco City Water Works did introduce pure fresh water into the City was not equivalent to an averment that the event referred to in the Statute had happened.

In the brief of Messrs. McAllister & Bergin, of counsel for the respondent (page 7), this averment of the complaint is expressly referred to. They say in reference to the allegations of the complaint in connection with the San Francisco City Water Works: "but while it is alleged that the Company accepted and used them, and introduced pure fresh water into the city, the complaint is silent as to when the Company commenced to do so."

The Court must be held to have examined the complaint fully, and its error, if it be one, was not in overlooking the averments to which attention has been called, but in the construction placed upon it. It is plain that the Court did construe the complaint, and in the language of the last decision, "*the adjudication of the Court, as to the character of the complaint and its legal effect, has become the law of the case. and it is too late now to inquire into its correctness.*"

With all deference to the Court, be it said that defendant's counsel do *not* say "that the Court *misconstrued* the complaint;" on the contrary they assert that the Court *construed* it, and by that

construction it was held that the event, which was to change the rights of the city, had not been shown to have transpired. And such being the construction, it was an "adjudication of the Court as to the character of the complaint and its legal effect and has become the law of the case, and it is too late to inquire into its correctness." We then accept, as we must, the first decision as correct. Now, when the old averment of the complaint is duplicated—when an amendment is made which is a mere repetition of what was there before—it is said that counsel having asserted that the complaint with the first averment was defective, are estopped to question its sufficiency after the repetition. Logically considered, a defective averment is still defective when repeated. Logically, a construction of an allegation is not changed because it occurs a second time. Logically considered, "the law of the case" as to an averment, created by a first decision, continues the law of the case as to the same averment ever after. Can it be maintained that when a construction is given to a complaint and "the adjudication of the Court as to the character of the complaint and its legal effect has become the law of the case, and it is too late to inquire into its correctness," that a simple repetition of a part of what is already there avoids the decision and opens the case up for a new and different determination? If it be so, that rule

sometimes thought very severe—that iron chain that has firmly held many a case on its second appeal—will prove but a rope of sand. Can that be a rational system which permits an averment held defective on a first appeal to be held sufficient on a second appeal and "the law of the case" avoided, simply because the averment is repeated under the guise of an amendment? And should counsel be estopped from questioning the averment the second time and applying the rule, because he questioned it the first time?

It is confidently urged that the Court can, consistently with fixed principles of law, look only at the record itself and the decision upon it; and if upon the second appeal the record is found to be substantially the same, the first decision as "the law of the case" must control.

When the identity of the records is established the rule invoked cannot be evaded or avoided by an inquiry into the reasons of the decision or the causes which led to it. It is then too late. In the clear language of the last decision "the adjudication of the Court as to the character of the complaint and its legal effect has become the law of the case, and it is too late now to inquire into its correctness." The Court then did on the first appeal determine "the character of the complaint and its legal effect;" and that determination "became the law of the case."

Being the law of the case, it must now hold the same complaint to be of the same legal effect as it always was.

In the subsequent points it will be shown that the averment in the complaint does not satisfy the statute, though on this subject reference is made to the able views of the learned counsel on the part of the respondent herewith presented.

III.

The defendant is not under any of the obligations imposed upon Ensign and his associates by the Act of 23rd April, 1858.

The complaint (at folio 3) alleges that the defendant "is a corporation duly organized and acting under and by virtue of an Act of the Legislature of the State of California entitled, 'An Act for the incorporation of Water Companies,' approved April 22d, 1858."

This act is to be found in the Statutes of 1858, pages 218 and following. By reference to that Statute we find that the Act of April 14th, 1853, providing for the formation of corporations for certain purposes, (Statutes 1853, page 87) and the Act amendatory thereof passed 30th April, 1855, (Statutes 1855, page 205) are made to extend and apply to all corporations then already formed, or that might be formed thereafter, to supply cities and their inhabitants with pure fresh water.

These laws referred to in the Act of 22d April, 1858, and that Act itself, constitute the general laws, therefore, under which the defendant was created, and from which it derives its powers. Beyond these we need not look and cannot look, for the Constitution itself, the paramount law of the land, declares in most unequivocal language, that "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes." The defendant not being a municipality the exception has no application. The Constitution having therefore limited the formation of such corporations to "general laws," and the complaint having specifically designated the "general laws" under which the defendant was formed, we look to those general laws alone for the powers of this corporation defendant.

Section 2 of that Act of April 22d, 1858, gave the defendant "the right to purchase, or to appropriate, and take possession of, and use and hold all such lands and waters as may be required for the purposes of the company upon making compensation therefor." The power of condemnation is then given.

Section 3 is a general equalizing clause putting all water companies upon an equality as to "privileges, immunities and franchises."

Section 4 defines the duties and provides for the rate of charges.

Section 5 gives the corporation *the right* "to use so much of the streets, ways and alleys in any town, city, or city and county, or any public road therein, as may be necessary for laying pipes or conducting water into any such town, city, or city and county, or through or into any part thereof." This right, to be sure, is subject to the reasonable direction of the Board of Supervisors, or city or town authorities, as to the mode and manner of exercising such right, but this would have been necessarily implied and attached to the right, for all rights must be exercised in a reasonable mode and manner with respect to the rights of others. "*The right*" to lay the pipes in the streets comes from the law, and that is enough for the purposes of the argument.

We then have the defendant corporation, organized under these general laws and with the general powers and rights and duties above referred to. Immediately upon its organization it became an artificial person—a legal entity—possessed of no property at all but entitled to acquire property and endowed with certain powers and rights which it might exercise. It continued through some lapse of time, however short, in this predicament. Though on filing its certificate of incorporation in the office of the County Clerk the signers of the certificate became a body politic and corporate, yet it could not act or even receive anything until the first meeting of its trus-

tees, to accomplish which required time and a compliance with the law (Stat. 1853, page 88, sec. 8).

It is therefore clear that, though the complaint avers that the defendant corporation "has become and is the owner of all the franchise granted one George Ensign," etc. (complaint, fol. 3), yet its organization under the general laws was a necessary preliminary to become the recipient of these franchises, and that very organization had already clothed it with all the powers and duties specified in the law.

But what franchise did Ensign and his associates have under the Act of 23d April, 1858? It is manifest that the franchise was far less than that already possessed by the defendant corporation. It had, under the law of its creation, the unrestricted right "to use so much of the streets, ways and alleys" of the "city and county and any public road therein, as may be necessary for laying pipes for conducting water into such town, city, or city and county, or through any part thereof." (Stat. 1858, page 219). It even had the power of condemnation. But Ensign and associates had merely the right to lay down such water pipes under great restrictions, and with severe limitations as to time and in other particulars. What, therefore, could Ensign and his associates give to the defendant by way of power

and privilege and franchise that it did not already possess?

An assignment by Ensign and associates of their limited and restricted franchise to the defendant, already possessed of the same franchise without the limits or restrictions, could have but one legal effect, and that would be to deprive Ensign and associates of their franchise—or in other words, practically to extinguish it. The assignee would get nothing, for after the assignment he would have nothing that he did not have before. This may be illustrated in various ways: Suppose A has a right of way across B's farm, along a certain private lane, at all hours, and with all kinds of vehicles; and that C and his assigns have a right of way along the same lane, but are limited to certain hours and certain kinds of vehicles. Let C assign all his right of way to A; C merely extinguishes his right to enjoy it personally, and the lesser right assigned to A is merged in his larger right previously existing, and which continues unaffected by the transfer.

Again: A has a power of attorney to grant, bargain, and sell land under full covenant of general warranty and for cash or on credit. B has from the same constituent, a power of sale, but limited to sales for cash, and by way of quit claim only, and with power of substitution. Let him substitute A, and A will take no new power not before possessed, and the original power will remain unaffected.

In the very nature of things, then, the defendant corporation could get nothing from Ensign and his associates by becoming owner of their franchise. The complaint is limited, in this regard, to a simple allegation that the defendant is the owner of that *franchise*. It is no where averred that the property, even of Ensign and associates, was conveyed to the defendant; nor that the defendant ever exercised, used or in any manner enjoyed the franchise granted Ensign and his associates.

Whilst it is averred that after the 13th day of February, 1865, the defendant did supply the City with water (folio 13), it is not alleged to have been done under any particular franchise or power, and all that it is alleged to have been done is referable to its general powers and rights as a water Company under the general law.

Perhaps a short history of the Ensign Act may make the above views clearer. In the original Statute of 1850, on the subject of incorporations, there was no provision for incorporating Water Companies, but on May 3d, 1852, (see Stat. 1852, page 171,) an Act was passed "To provide for the incorporation of Water Companies," which made the provisions of Chapters one and five of the Statute of 1850, applicable to Water Companies. The Act of 1852, however, (Sec. 3,) instead of giving Water Companies the general right to supply cities with water, express-

ly limited them to cases where they should be "previously authorized by ordinance, or unless it be done in conformity with a contract entered into between the City and the Company." This remained the law down to the time of the passage of the Act of the 22d April, 1858, above referred to, and under which the defendant was incorporated. That law removed the restrictions and limitations placed upon Water Companies by the Act of 1852. The Ensign Act, however, must have been introduced as a bill, before one of the houses of the Legislature, long before the Act of April 22d, 1858, was passed, for the Ensign Act itself was approved on the next day, the 23d April, 1858. The Ensign Act was intended to relieve him and his associates from the necessity of procuring from the City authorities, an ordinance to allow them to supply the City with water, or entering into a contract. There was doubtless a great rivalry between Water Companies, and Ensign and associates applied to the Legislature for the right, rather than to the Supervisors of the City and County. No doubt the discussion of the Ensign Act before the Judiciary Committees of the Legislature, demonstrated the folly of restricting any one in the introduction of water into Cities, and the danger of giving Cities and Towns such power for evil, as the Act of 1852 gave. The result was the introduction and passage of the Act of 22d April, 1858. It and the

Ensign Act were pending in the Legislature together; they doubtless went to the Governor together for his approval; and doubtless the mere difference of one day in the dates of the respective approvals, was merely accidental. The Ensign Act had been passed in fear that the general Act might not pass. When it did pass, it met the evil that prevailed before, it destroyed the power of the authorities of the City over the subject, capable of being used in a most fraudulent manner, and it gave any Company the right to enter into competition with any other, and to supply whomsoever it might obtain as a customer.

The Ensign Act, therefore, became and was on its approval, entirely impotent. The general Act covered the same subject matter, and the defendant incorporated under the general Act.

We therefore submit that, as the defendant exercised no privilege or franchise which it did not possess under the general law, no duties or burdens attached to it except under the general law.

That the Corporation defendant could not derive any rights or powers under the Constitution of this State from any source other than the general laws, will be presented under one of the subsequent points.

IV.

It does not appear that the Ensign Act (of 23d April, 1858,) *ever became a law, or went into effect.*

Referring to this Act which is annexed to the Complaint as Exhibit A, we find in Sec. 8, (Fol. 34, *et seq*). the following provision, viz:

"This Act shall not take effect, unless the parties named in Section 1, shall within sixty days after its passage, duly organize themselves in conformity with the existing laws, regulating corporations, now in force in this State."

Now this Act is a private Act, and not as a general rule to be noticed judicially by the Court. The Court only notices it because it is specially pleaded, but when specially pleaded, we find that it is not to take effect until the happening of an event; of the happening of that event, the Court cannot take judicial notice, and the Complaint nowhere avers that Ensign and his associates did organize themselves within the sixty days, or any other time. It is nowhere averred that the Act did take effect.

Again, the privileges granted Ensign and his associates were conditional. They were (by Sec. 1, Fol. 28,) to lay down 3,000 feet of pipe within one year. There is no averment on this subject nor anything to show that no forfeiture occurred.

In this connection it is to be remembered, that

every intendment is to be taken most strongly against the pleader.

Collins vs. Butler, (14 Cal., 227.)
Sparks vs. De la Guerra, (Ib. 111.)
Green vs. Covilaud, (10 Ib. 322.)
Dye vs. Dye, (11 Ib. 167.)

We therefore confidently submit that upon this point alone, the judgment of the Court below should be affirmed.

V.

The Ensign Act is unconstitutional.

Attention has already been called to the provision of the Constitution of this State, (Art. 4, Sec. 31,) which prohibits any such Corporation as a Water Company from being "created by special Act," and making it necessary that they should "be formed under general laws." The object is manifestly to do away with all the abuse, corruption, fraud and wrong, done under the old system of Special Charters. The Constitution, therefore, very wisely places a positive check on the Legislature, and in direct terms declares, that only "general laws" shall be passed on this subject. These "general laws" remain the law of the land throughout time. Any body of men, for any of the purposes permitted, may become incorporated. All are upon a common platform, and

all have equal rights, privileges, immunities, franchises and powers. They enter into the business under the keen spirit of competition, and the odor of monopoly is dispersed. Each is put upon its good behavior, and each must look to its own enterprise and energy for success.

Corporations thus become what they should be —an aggregation of capital for great enterprises, beyond the limits of ordinary fortunes—having the machinery of a body politic and corporate, and being an artificial person protected from dissolution by the death of one of its members. But it still remains subject to Legislature control, and its very organization may be changed, and the law, from which it derives life, may itself be repealed.

What does the Constitution mean by the language, that "Corporations may be formed under general laws, but shall not be created by special Act?" It certainly did not refer to mode and manner, merely of legislation on the subject. It had a deeper meaning, a more profound intention, a much sounder policy. It certainly had in view the powers, privileges, franchises and immunities of Corporations, and none of these were left to special legislation, but were required to be given, controlled and limited by the general laws on the subject. The Corporation itself is a franchise, and is defined by Mr. Justice Blackstone to be a

franchise. He says it is "a franchise for a number of persons to be incorporated and exist as a body politic, with a power to maintain perpetual succession, and to do corporate acts, and each individual of such Corporation is also said to have a franchise, or freedom."

2 Bl. Comm. 37.

See also *Dartmouth College* vs. *Woodward*, 4 Wheat. 657.

If these corporate powers be then franchises, we must look to the general law for all the franchises any corporation can enjoy. If it does not enjoy them under the general law, under what law does it hold them? The extent of the franchises of a corporation is to be determined by the charter. (*Auburn and Cato Plank Road Co., vs. Douglass*, 9 N. Y. R. 451.)

Mr. Bouvier, in his Law Dictionary, (Word *Franchise,*) says in regard to franchises, "In the United States they are usually held by corporations created for the purpose, and can be held only under Legislative grants." He cites a large number of cases. Apply to this the language of the Constitution of California prohibiting special acts and requiring all corporations to be formed under general laws, and the result seems plain—that the general law must be regarded alone in determining the franchises which may be

enjoyed by a corporation, and that it can have none but what the general law gives.

These corporate franchises were held, in the great Dartmouth College case cited, to be inviolable, and that they were protected by the Constitution of the United States as contracts. For this reason, also, our Constitution prohibited special acts, and made all the general laws liable to alteration or repeal at the will of the Legislature. The power to alter or amend is limited to the general laws and the special acts relating to municipalities. If any special act can give powers and privileges to a particular corporation, it follows within the principles of the Dartmouth College case, that a contract results, which, under the Constitution of the United States, is inviolable. There is then but one rule of safety under the Constitution of the State, and one mode alone of maintaining its manifest policy; and that is to confine all corporations to the general law under which they are formed, and denying them any powers, privileges or franchises derived from any special law.

The Ensign Act seems to be an ingenious attempt to evade the Constitution—an attempt to comply with the letter, but a design to accomplish what its spirit forbids. A franchise was "created by special act" and given to "George H. Ensign and his associates." In Section 1, it is called a "right," in Section 6, a "privilege," whilst in

Section 5, it is called a "franchise." But the entire vesting of these rights, privileges and franchise all depend (by Section Eight) upon the condition precedent that Ensign and his associates shall "duly organize themselves in conformity with the existing laws regulating corporations now in force in this State."

Now is it not indisputable that the Legislature intended that "Ensign and his associates" should not have, take, or enjoy these franchises as individuals? Is it not manifest, that they would take merely as corporators? Was not the whole law made to "take effect" only by virtue of the act of becoming incorporated? After that act of incorporation, would not the company take the franchise rights and privileges granted, as the intended grantee? We respectfully submit that words cannot make this plainer; and that if the Court connot look through the flimsy guaze-work which covers this Act, the Constitution itself, is too easy of evasion to afford any protection against legislative power.

We respectfully submit that the Ensign Act is unconstitutional.

VI.

What is the true construction of the Ensign Act?

It is claimed on the part of the plaintiff that the defendant, ever since the 16th September, 1858,

has been under an obligation to furnish to the City and County all the water it needed for fire and all other municipal purposes, free of charge; and that that obligation continues and will continue during the corporate existence of the defendant. At the date of the Ensign Act (23d April, 1858,) the City and County of San Francisco contained a population of about eighty thousand souls; it has grown to be a city of about one hundred and eighty thousand. New streets have been opened and its sewers have in the mean time been extended many miles. Its demands, for protection against fire, have greatly increased, and the power of steam, to exhaust the water, has taken the place of the slow work of the human arm. The hospital,s almhouse, prisons, and other public buildings have been enlarged and increased, and each has its demand for more water. New public squares have been laid out, improved and planted in grass and shrubbery, and to their very existence large supplies of water are needed. Innumerable streets are to be watered. At last comes the great park, miles in extent. with thousands of young trees, innumerable plants, and in prospect large grassy lawns and numerous artificial lakes, fountains and rivulets. The squares and parks are "the lungs of the cities," and are claimed to be necessary to health and beauty and morals. They must have water, and without water they cannot exist. In the future the demand for water must

increase as much as in the past, and it is claimed that free of all charge, this great municipal demand, must be supplied by defendant "to the full capacity of the said water works."

The reason why the defendant is bound to furnish this amount of water throughout all time is because it was granted the privilege of supplying the citizens with pure water—a privilege that any water company could enjoy without bearing the burden.

The proposition, we submit, shocks one's sense of justice; it is revolting to all ideas of right. Were it a private contract between two indivduals, it would not be enforced, because of being unconscionable;—it would be set aside, on the ground that the defendant had been overreached, and that in conscience it ought not to be bound.

In construing a contract or a law, it is legitimate to look at the results which follows any particular construction, and if one construction be in results, just and fair, and has duty and compensation corresponding and adequate; and the other is manifestly unfair and unjust, having a duty entirely disproportioned to the compensation we may rationally claim the first to be the true construction.

We have shown above, the result of the one construction of the law and the enormity of the plaintiff's demands. All that the defendant claims, is

that furnishing all the water needed for the extinguishment of fire to the full capacity of the said water works, pending the fire, free of charge; it ought to receive a just compensation for water supplied for other municipal uses, the rate or price to be fixed by a fair Commission.

What is there in the act referred to, that renders this construction *impossible;* we do not say irrational, for we respectfully submit that we have already shown this to be the only rational construction? The benefit to the company was not so great, that it should perform this onerous duty for the privilege granted it; for that privilege was no monopoly. Any body of persons could form a water company in competition and exercise the same rights the defendant enjoyed, without any corresponding burden.

Such considerations drive our opponents from the field of argument; they only can make a stand on the supposed letter of the law; and to the language of the Act we now turn.

Let us take notice here that the 4th Section applies not only to supplies of water under Section 1, but also to supplies under Section 3. Very little reflection, we submit, makes this clear. Until the introduction of water into the City and County by some other person, the company is only bound to furnish to the City, free of charge, water for fires, during the pendency of the same.

It may therefore charge the City for water, for other municipal uses. The price to be charged to the city, for such water (with the exception of fires, and on the assumption that no other person has yet introduced water), is, of course, not arbitrary in the company but is to be fixed by the Commission. The result then is, that at the time now referred to, the words in Section 4, viz.: "with the exception mentioned in Section 3," refer, merely and only, to the case of fires. We have therefore given that language an application, and the only application necessary to give each part of the Section a legal effect and meaning. The result is (no water having been introduced by any other person) that the Company must furnish water for fires, during the pendency thereof, free of charge, but may charge the city for water for other municipal purposes, and may charge citizens. The price and rates for both these supplies—to the city and to the citizens—is to be fixed by the Commission. In other words, we have three cases: *first*, a supply of water to the city for fires free of charge; *second*, a supply of water to the city for other municipal purposes at a rate or price fixed by the Commission; *third*, a supply to the citizens, at the same rate or price fixed by the Commission. This condition of things might run on forever, or it might be changed by the event of water being introduced by another person. But what change does that event pro-

duce? *The statute only mentions one, and that one is not as to price, but only as to the quantity of water to be furnished the city.*

Instead of being compelled to supply the City with all its wants—for fires, free of charge, and for other municipal purposes, at the rates fixed—it is now only compelled to furnish its quota or proportion for either or both purposes. How can it be said that this provision specifically providing for charge of quantity, merely, necessarily or rationally applies to a change as to place? It is argued that as after the event referred to, as well as before, the water must be furnished for fire, free of charge, so it must be furnished for other municipal purposes, free of charge. This we think a *non sequitur*. The regulation is as to quality merely, and if the right to charge was intended to be changed, it would not have been left to mere inference. So important a matter would have been more plainly referred to.

Nothing against the right to charge, can be inferred from the words in Section 3, "shall *furnish* for fire and other municipal purposes," and, because in section 1 it is made the duty of the Company to *furnish* citizens, along the line of pipe, with water. Of course they are to be charged.

But it may be asked why the Company was only to furnish its quota of water for municipal purposes, other than fires, if it could charge for such

supply, and why the city could not continue to take all its water from one company? The answer, we think, is that as the burden, in case of fire, was to be proportionally borne by the respective companies, so the right to supply the city for "other municipal purposes," for a price, was to be proportionally shared, otherwise one company might be furnishing a large *quota* for fires, free of charge and yet get no share of the city's patronage, for other municipal purposes. The point aimed at was exact equality between companies, and impartiality to all. The Ensign Act, itself, in Section 7, shows the existence of two other companies at that time—the Mountain Lake and the San Francisco City Water Works. At the same time, Section 3 of the Act of the 22d of April, 1858, passed the day before the Ensign Act, placed all water companies, already incorporated, or that might thereafter be incorporated, upon an exact equality as to "all privileges, immunities and franchises."

As before observed, the word "exception" in Section 4 of the Ensign Act, clearly is limited to the case of fires, if there be no water introduced by another person, and it must be read exactly as if it said, "with the exception of water for the extinguishment of fires." Having that definite meaning, we cannot see how that meaning would become changed afterwards, and how the singular

number "exception" could become plural and embrace a new category of a distinct character.

If we are not right, another curious result is found. Let us suppose water to be introduced by another person, and let us take the construction claimed—that thenceforth the two companies must furnish water free of charge, in fair proportion, for all municipal purposes. This result is produced by the introduction of no particular amount of water—the introduction of water from the most insignificant spring would do. The defendant may have been supplying many millions of gallons per day, and the new person introduces only one hundred gallons; yet the result is, that the defendant, instead of having the city for a customer for water for its general municipal purposes, for a reasonable price, is bound to supply the city without charge, its quota, or the proportion that so many millions bears to one hundred gallons.

But these curious results do not stop here, for we must take all possible contingencies, and consider what the consequences would be if the new company should, after introducing its water, fail and no longer supply its quota. In fact, the complaint presents this very condition of things as having happened.

It is shown that the San Francisco City Water Works "*ceased to exercise any of said franchises*, and

the said defendant is and since then has been the *only* corporation or person engaged in introducing pure, fresh water into said City and County of San Francisco." What change is here again produced? After this event, is it the duty of the defendant to continue only to furnish its quota, or must it now furnish all? Or does the defendant become restored to its original position? It would seem but fair, that if by reason of the introduction of water by another person, the defendant was compelled to furnish its quota for all municipal purposes, then, when the new company failed and the reason ceased that the rule should cease, and the defendant be restored or re-invested with its original right to charge, for all purposes, other than fire.

But certainly it could not be that after such failure, more than the established *quota* would have to be furnished. It could not be that the event of the introduction of water by another company, would take away from the defendant its right to charge for supplies for general municipal purposes (other than fires), and require the defendants to furnish its quota free of charge, and that as a consequence of this and the subsequent failure of that other company, would arise new obligations on the part of the defendant to furnish not only its own quota, but also the proportion of the failing Company! Yet this is the position of the plaintiff. The proposi-

tion is coldly asserted, that whilst the San Francisco City Water Company furnished water, it and the defendant were obliged to supply to the city, each its quota; and now that the City Water Works has ceased to furnish its supply, the defendant must furnish what the other ought to have supplied.

It is no where shown in the complaint what the City Water Works did supply, nor does the complaint furnish any data or criterion by which we can determine the quota or proportion, which that supply attached to each company. The utmost that could be claimed, is that that amount become the standard or test and would remain unchanged by any subsequent failure of either company. But this position leads to another result worthy of notice.

Assuming that, prior to the introduction of water by the City Water Works, the city had the right to take water, "for the extinguishment of any fire or fires, during the pendency of the same free of charge, to the full capacity of the said water works;" and that after such intoduction by others the amount to be furnished by defendant for fires was limited to its quota merely; then no matter how great the fire or demand for water at such fire, all that the defendant might furnish beyond its quota it would be entitled to charge for.

In other words, if the City Water Works introduced as much water as the defendant, each at fires should have furnished its quota only. If the city (both companies existing) should take from the defendant more than its quota, and let the other go free, it would have to pay for that excess. When, therefore, the City Water Works went out of existence, the city became responsible for all water used at fires, since that time, beyond the defendants quota. How much more rational then are the views and construction we have urged upon the Court, and how much more, in result, consonant with justice and equity to both parties.

In a word, in the beginning the defendant would supply, for fires, all the water needed to its entire capacity; but would be entitled to charge for supplying for other municipal purposes a fair price, to be fixed by the Commission. When any person introduced water, the rights and obligations of the parties were changed only as to quantity. The defendant only became bound to furnish its quota for fires, free of charge, and it only had a right to furnish its quota for other municipal purposes, for which it could charge, leaving the other company its share of the city's patronage. But when, again, there remained but the defendant alone, it would become restored to its original position—it would be bound to furnish all necessary water for fires free of

charge, but, as a corresponding benefit, it could charge for all supplies for other municipal purposes. This we deem the true construction of the Ensign Act.

In conclusion, we beg leave to submit that, though the construction contended for is the true construction of the Ensign Act and would accomplish all the defendant seeks, yet that the defendant was never under any of the obligations imposed by it, and that the Act itself is unconstitutional. Should the views here advanced be maintained, the defendant would still, under the Act of April 22d, 1858 (Stat. 1858, page 219, Sec. 4) be obliged to "furnish water to the extent of their means," to the City and County, "in case of fire, or other great necessity, free of charge," but would be entitled to charge for water for ordinary municipal uses, reasonable rates to be fixed by the Board of Commissioners under that Act. In common justice, this should be so, and we respectfully urge that a re-hearing should be granted, that these questions may be more fully argued and that justice may prevail.

August, 1873.

Respectfully submitted.

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1873 water company, San Francisco, defendant and respondent. - The city and county of San Francisco, plaintiff and appellant, vs. The Spring Valley water works, defend